No. 18451

United States Court of Appeals

For the Ninth Circuit

THE MONTANA POWER COMPANY,
a Montana Corporation,

Petitioner,

vs.

THE FEDERAL POWER COMMISSION,

Respondent.

Brief of Petitioner

PETITION FOR REVIEW OF ORDER OF THE FEDERAL POWER COMMISSION

William H. Coldiron
John C. Hauck
40 East Broadway
Butte, Montana

WEIR, GOUGH & BOOTH
First National Bank Building
Helena, Montana
ATTORNEYS FOR PETITIONER

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MISCELLANEOUS

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STATEMENT OF JURISDICTION

Petitioner seeks to review the Order of the Federal Power Commission. Jurisdiction of this Court to review this Order is based on the provisions of Section 313 (b) of the Act, 16 U.S.C.A. 825 l, and the provisions of the Administrative Procedure Act, 5 U.S.C.A. 1009, granting jurisdiction.

The application of The Montana Power Company, a New Jersey corporation, was filed with the respondent

Commission August 29, 1961 (R. 706). The Order of the Commission, attached to the petition as Exhibit 1, was issued October 12, 1962 (R. 1157). Petition for rehearing was duly filed November 13, 1962 (R. 1178). Order denying the petition for rehearing, in part, was issued December 13, 1962 (R. 1194). This petition for review was filed February 9, 1963.

STATEMENT OF THE CASE

The Montana Power Company, a New Jersey corporation, had its principal office at Butte, Montana, and was authorized to do business in Montana, Idaho and Wyoming (R. 707). The Montana Power Company secured a Preliminary Permit from the United States Department for work on the Mystic Lake property in December 1916. Extensions of the Preliminary Permit were granted and the preliminary work completed. The applicant filed its application for Final Power Permit on January 27, 1919 (R. 996). On May 27, 1920, the Company was issued a Final Power Permit by the Secretary of Agriculture under existing laws. The project was known as the Mystic Lake Hydroelectric Development (R. 706, 982, 1157). Work progressed and the Mystic Lake Development was in full operation in 1926, although the project was not completed until 1927 (R. 996, 1157). It has been in operation continuously since that time.

The Montana Power Company, a Montana corporation, was formed in 1961 and an agreement of merger was entered into between the New Jersey corporation

and the Montana corporation to merge the two companies for the sole purpose of transferring the corporate domicile to Montana. Application to the Federal Power Commission for approval of the merger was filed June 13, 1961 in Docket No. E-7000 (R.1). While this application was pending and before approval was granted, the New Jersey corporation on August 29, 1961 filed the application for license of its constructed Mystic Lake Hydroelectric project for a term of fifty (50) years, under the provisions of Section 23(a) of the Federal Power Act (16 U.S.C.A. 816). This section is set forth in Appendix B. The application was assigned Project No. 2301. The application showed that the New Jersey corporation intended to transfer the license to the Montana corporation, if the merger is approved.

The merger agreement authorized the Directors of the Montana corporation to act in the name of the New Jersey corporation to transfer any property after merger (Art. VIII, Joint Agreement, (R.685). The provision was approved by the Commission in Docket E-7000. On November 1, 1961, in the merger case, the Commission authorized the New Jersey corporation to transfer property to the Montana corporation and required compliance within sixty (60) days. These transactions were consummated on November 30, 1961 (R.1157). On October 12, 1962, more than eleven months after the Order approving merger (Docket E-7000) was issued, the Commission issued its Order in the license matter (R.1157). This Order is based on

the premise that the New Jersey corporation ceased to exist on the date of consummation of the merger and that the Final Power Permit likewise ceased to be of any legal effect, and concludes applicant is not entitled to a license under Section 23(a) (16 U.S.C.A. 816) of the Act (R.1158). The Order then proceeds to grant a license to the Montana corporation for the balance of the term of the Final Power Permit or until December 31, 1969 under the provisions of Section 4(e) of the Act (16 U.S.C.A. 797).

Petition for rehearing was filed within the time allowed. The Petition presented the questions now presented for consideration of the Court relating to the refusal of a 50-year permit under Section 23(a) and the granting of a permit for the remainder of the period of the Final Power Permit under Section 4(e) of the Act (R. 1178). Additional matters were raised relating to permits for transmission lines which provisions were revised in the Order of December 13, 1962 (R. 1194). These matters relating to the Power Transmission Lines will not be referred to again. Except for this modification, the petition for rehearing was denied.

No hearing was ever held and the Company was never given any opportunity to present testimony. The action of the Commission was contrary to the application before it and contrary to the terms of the merger agreement which had been approved by the Commission.

SPECIFICATIONS OF ERROR

I.

The Commission erred in finding in its Order of October 12, 1962 (R.1157 and Ex. 1 to Petition) that Petitioner had filed an application for license for the Mystic Lake Project on August 29, 1961, when, in fact, the applicant was the New Jersey Company.

II.

The Commission ered in finding that the New Jersey corporation ceased to exist as of the effective date of the merger, when the Commission knew the merger agreement contained provisions which permitted continuance of the New Jersey corporation to complete any matter subsequently arising and when the agreement to that effect had been approved by the Commission.

III.

The Commission erred in failing to find that the New Jersey corporation was, and Petitioner is, the holder of a permit which allowed the continued operation under the permit in lieu of applying for a new license. The Final Power Permit was valid and the holding that the permit ceased to be of legal effect was erroneous and resulted in taking of property contrary to the terms of Section 23(a) of the Federal Power Act, the Administrative Procedure Act and violates the due process clauses of the Constitution of the United States.

IV.

The Commission ered in finding applicant was not giving up anything of value. The Final Power Permit held by applicant establishes "fair value" of the project is to be allowed, whereas issuance of a license under Section 4(e) of the Act deprives the petitioner of the "fair value" status and makes the project subject to being taken over under the provisions of Section 14 of the Federal Power Act, depriving Petitioner of a real and valuable right in the property.

V.

The Commission erred in issuing a license under Section 4(e) of the Federal Power Act when no application was made under that section and when the application was made as a matter of right under Section 23(a) of the Act. Such action attempts to terminate a valid Final Power Permit and substitute a license under Section 4(e) depriving applicant of a "fair value" status.

VI.

The Commission erred in depriving Petitioner of "fair value" status for the project and in depriving Petitioner of its property without due process of law. The Commission was at all times advised of the status of the application and it cannot deprive Petitioner of its property without violating the Federal Power Act, the Administrative Procedure Act and the Constitution.

VII.

The Commission erred in issuing a license for less than fifty (50) years, as applied for, and in issuing a license only for the remaining term of a valid Final Power Permit.

VIII.

The Commission erred in issuing its Order without holding a hearing either on the application or on the petition for rehearing.

ARGUMENT

INTRODUCTION

It is fully recognized that the review by the Court in matters relating to decisions of Administrative Agencies is limited. If the Commission action is supported by adequate facts, is within statutory delegation of power and does not violate the tenets of legal requirement or due process the action is to be affirmed. If the Commission action is not supported by fact and law or, if it fails to meet the required standards, it should be set aside and returned for proper consideration. These standards are incorporated in 5 U.S.C.A. 1009 which sets forth the scope of review.

SUMMARY OF ARGUMENT

We have set forth eight specifications of error. These may be grouped for argument. Specifications I, II and III are related and will be discussed under Point 1. Specifications IV, V and VI will be considered under Point 2. Specification VII will be discussed under Point

3 and Specification VIII will be discussed under Point 4.

Point 1. The Commission recognizes that The Montana Power Company, a New Jersey corporation, was the owner of a valid Final Power Permit issued May 27, 1920 with expiration date of December 31, 1969. The application also shows that the Mystic Lake Hydroelectric Development is located on lands of the United States and that the project was completed in 1927. Docket E-7000 had been filed June 13, 1963 for approval of the merger of The Montana Power Company, a New Jersey company, with The Montana Power Company, a Montana corporation. Approval of this merger application was not made until November 1, 1961, better than two months after the application for license in the instant case was filed. The application of the New Jersey corporation for license of the Mystic Lake Project under the terms of Section 23(a) referred to the merger application and specifically sought permission to continue operation if the approval of the merger application was given before issuance of license in this proceeding. The Commission had likewise approved the merger agreement which provided for operation by the New Jersey corporation pending final issuance of the license. Under these conditions the Commission was in error in finding that the New Jersey corporation ceased to exist and the Final Power Permit ceased to be of legal effect. The Commission had no right under the facts to declare this corporation out of existence and to grant a license different than that applied for.

Point 2. Based on the erroneous assumption that all rights under the Final Power Permit ceased to exist when the consummation of the merger was made on November 30, 1961, the Commission finds that the applicant has not given up anything of value. Under the Power Stipulation, the method of valuation was set forth as the reasonable value on original cost or reproduction cost less physical or functional depreciation (R.995). Congress, by the inclusion of Section 23(a), recognized the rights of permit holders where the permit was issued prior to the passage of the Federal Water Power Act. By the Order in this case the Commission has failed to give effect to this Congressional directive and violated the terms of the Final Power Permit. The Commission has granted a license for the remaining period of the valid permit under conditions which eliminate fair value and substitute net investment under the provisions of Sections 4(e) of said Act. This net investment is to be determined in accordance with Article 19 of the terms and conditions of the license (R.1173). The "fair value" basis of determining value is a property right and the Commission has deprived applicant of this property in violation of the Federal Power Act, the Administrative Procedure Act and the due process clauses of the Constitution.

Point 3. Specification of Error VII is based on the error in not granting the license for fifty (50) years as applied for. In the absence of some valid reason permits should not be issued for less than a term of fifty (50) years. To issue one for the remaining eight (8) years

of a Final Power Permit which was renewable, is not justified by the application or the record. The Commission has, in fact, not granted any greater rights than applicant already had in period of time and has attempted to deprive applicant of part of the value of the plant.

Point 4. Specification of Error VIII relates to the failure of the Commission to hold a hearing to determine the nature and conditions of the application or the rights of the parties. There is nothing in the record to indicate any intention of changing or substituting applicants or of intention to grant a license under provisions other than as applied for. If any such intention was considered then the Commission should have so advised applicant and held a hearing to give the applicant opportunity of hearing. Failure to do so deprives the applicant of valuable rights which are protected by the Administrative Procedure Act and the due process clauses of the Constitution.

ARGUMENT

POINT 1

On June 13, 1961, The Montana Power Company, a New Jersey corporation, and The Montana Power Company, a Montana corporation filed an application for approval of merger. (Docket No. E-7000) The sole purpose of this proceeding for merger was to change the corporate domicile from New Jersey to Montana (R.1). At that time the New Jersey corporation was the owner of a valid Final Power Permit which had

been issued to it May 27, 1920 by the Department of Agriculture, Forest Service, and was to expire on December 31, 1969 (R.982). On August 29, 1961, the application for license of the Mystic Lake Hydroelectric Project was filed by the New Jersey corporation under Section 23(a) of the Federal Power Act, 16 U.S.C.A. 816. (R.705), appearing in Appendix B. This section reads as follows:

> "*Preservation of rights vested prior to June* 10, 1920. The provisions of sections 792, 793, 795-818, and 820-823 of this title shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license under this chapter, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of said sections and in such case the provisions of this chapter shall apply to such applicant as a licensee under this chapter: Provided, That when application is made for license under this section for a project or propects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of sections 792, 793, 795-818, and 820-823 of this title and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing. June 10, 1920,

c. 285, § 23, 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846."

No question is raised concerning the applicability of Section 23(a) to the New Jersey corporation or to the Final Power Permit issued for Mystic Lake Project. It is also a matter of contract between the government and the New Jersey corporation that the value in event of surrender should be the fair value of the property (R.995). These rights, which are contract rights under a valid permit, were fully protected and preserved by Section 23(a) of the Federal Power Act, supra.

The Commission at all times was fully advised of the intention of the New Jersey corporation to assert its rights under Section 23(a) of the Act. Paragraph 1 of the application reads:

> "1. The Montana Power Company, a corporation organized under the laws of the State of New Jersey and having its general offices and principal place of business at 40 East Broadway in the City of Butte, State of Montana, hereby makes application under Section 23(a) of the Federal Power Act for a license for a term of fifty (50) years for a project already constructed and presently being operated under a Final Power Permit issued by the Secretary of Agriculture on the 27th day of May, 1920, pursuant to the Act of February 15, 1901 (31 Stat., 790), for a term expiring December 31, 1969. *The Applicant further requests that it be granted authority to continue the operation of this project pending the issuance of a license in the event the joint application of the Applicant and The Montana Power Company, a Montana corporation, in Docket No. E-7000 for approval of the merger of the Applicant and said Montana corporation, be approved prior to the issuance of the*

license herein requested. (Emphasis ours) (R. 706)

Paragraph 3 of the application reads:

"3. The applicant is a corporation organized under the laws of the State of New Jersey,

Applicant is qualified and authorized to operate and do business in the States of Montana, Idaho and Wyoming.

Applicant intends to merge with the Montana Power Company, a Montana corporation, which corporation has been created for the sole purpose of providing a vehicle for the change of Applicant's corporate domicile from the State of New Jersey to the State of Montana. Applicant and the Montana corporation have applied to the Federal Power Commission under the provisions of Section 203(a) of the Federal Power Act and Part 33 of the Regulations under the Federal Power Act for approval of said merger. (See: Docket No. E-7000)

Applicant propose to transfer the license herein applied for to said Montana corporation if the Federal Power Commission approves the merger as requested in said Docket No. E-7000. (Emphasis ours) (R.707)

In Docket E-7000, the Commission approved Article VIII of the Joint Agreement of Merger dated April 19, 1961, reading as follows:

"The New Jersey Corporation agrees, when requested by the Montana Corporation, from time to time, to execute and deliver such deeds and other instruments and to take such other action as the Montana Corporation shall deem necessary or convenient in order to vest and confirm in the Montana Corporation title to any property of any kind whatsoever, which the New Jersey Corporation acquired, or to be acquired as a result of this merger, and otherwise to carry out the intent and

purpose of this Joint Agreement of Merger. *The officers and Directors of the Montana Corporation are authorized to take any and all such action on and after the effective date of the merger in the name of the New Jersey Corporation.*" (R.685, 1179) (Emphasis ours)

There was never but one application filed for the Mystic Lake Project and that was by the New Jersey corporation. There was never any substitution of parties. The Commission was fully aware of the application and its nature and had the application before it for two months before approval of the merger (Tr. 1078) and three months before the consummation of the merger on November 30, 1961. The Commission knew that the New Jersey corporation sought authority to operate Mystic Lake until the license could be issued and transferred. It knew and approved of the argreement authorizing the directors of the Montana corporation to take the necessary steps to transfer the property for the New Jersey corporation.

Nothing was said about the Mystic Lake application in the merger approval. The merger approval required compliance within sixty (60) days. Without taking action on the license application before it, and by requiring prompt compliance with the merger authority the Commission now claims termination of the Federal Power Permit. There is no justification in the facts for the assertion that the New Jersey corporation ceased to exist, or that the Final Power Permit ceased to be of any legal effect as of the date the merger was consummated. Even if the statements in the application

and merger agreement were not considered, this method of procedure would be allowing the Commission to take advantage of its own delays and failures to act on an application before it.

Section 23(a) of the Federal Power Act, 16 U.S.C. 816, was formerly Section 23 of the Water Power Act. The only change between the former 1920 Act and the 1935 Act was a technical change of the word "Part" for "Act" and a change in the last sentence to change the determination of "fair value" by the Commission, instead of by the United States District Court. These changes are not material here and for purposes of this case we may consider the present act as being in effect since 1920. Proposals to enact legislation which ultimately culminated in the Water Power Act of 1920 commenced in 1917 with the introduction of S 1419, 65th Congress and reported in S Rept. No. 179 (56 Congressional Record 227). The House Committee held hearings and made its report in H Rept No. 715 (65th Cong. 2d Session). Section 23 of the substituted S 1419 read as follows:

> "Sec. 23. That the provisions of this Act shall not be construed as revoking any permit or valid existing right of way heretofore granted, or as revoking any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way or authority, may retain the same subject to the conditions set forth in the grant thereof and subject to any and all rules and regulations applicable thereto and existing at the date of the approval of this Act, or may apply for a license hereunder, and upon such application the

commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder." (Rept. p. 11)

The only discussion of Section 23 in the Report is as follows:

"Section 23 provides that no provision of this act shall be construed as revoking any permit or valid existing right of way heretofore granted, or as revoking any authority heretofore given pursuant to law; and provides that any person or corporation holding such a permit or right may apply to the commission for a license under this act, and the terms and conditions on which such permit may be granted." (Rept. p. 20)

In debates Mr. Sims, Chairman of the House Committee in discussing Section 23 said:

"The bill provides that existing powers may come in and seek a license under the bill. If it should be permitted, it would be subject to the provisions of this bill but not before." (56 Congressional Record 9047, 65 Cong. 2d Sess.)

* * *

"A number of power plants have been developed under laws heretofore passed, and there have been water powers developed under the revocable permit. This section provides that those powers should not be interfered with or conditions added to them unless they voluntarily come in." (56 C.R. 9048).

The Bill failed to pass the 65th Congress and H. R. 3184 identical with the Conference Bill of the preceding Congress (S 1419) was introduced in the 66th Congress. The congressional consideration of Section 23 is shown in an offered amendment by Mr. French.

"MR. FRENCH. Just a word as to that amend-

ment. In the part of the section that has been read there are three provisions set forth governing the rights of persons or organizations that have been granted permits or licenses heretofore. The three propositions are:

First. That this act does not attempt to revoke any existing permit.

Second. We affirm the conditions set forth in any permit that may have been granted.

Third. Opportunity is granted for the concern to apply for a license under the provisions of this act.

Nok, I submit that the second proposition ought not to be included in this bill. The first one is all right. We do not care to annul or wipe out by legislation any right or grant that exists now under permit or license that may have been issued by either one of the three departments. On the other hand, we ought not, in a general blanket law of this kind, to affirm, approve, and ratify whatever conditions may be set forth in permits or licenses that may have been issued heretofore by the War Department, the Agricultural Department, or the Interior Department."

* * *

"MR. RAKER. I understand the gentleman's contention is that with all the terms and rights and authority now given there might be a possibility of confirming them by this legislation.

MR. FRENCH. I am afraid of that.

MR. RAKER. Then, because there is no provision, what will become of his right if the board refuses to grant him a permit under this act? It says 'may retain the same subject to conditions set forth in the grants thereof.' Now, there is no penalty against a man, no taking away that right extended to him by this act, if the commission fails to grant him a license under this act. Is that right?

MR. FRENCH. No; he has two alternatives.

The intent of Congress to recognize the vested rights under existing permits was fully set forth. The holder of a valid and existing permit may continue to operate under that permit. It may at its option within the life of the permit apply for a license under the provisions of Section 23(a) of the Act and be entitled to the benefits recognized and granted by Congress.

The intention of Congress to exclude certain projects from the Federal Power Act was clearly recognized in *Niagara Falls Power Co. v. Federal Power Commission* (CCA 2, 1943) 137 F.2d 787, 791, where the Court said:

> "Although Congress of course meant to exclude certain existing 'projects' from the new system, in general its purpose was to set up a system of comprehensive regulation of water power. We must assume that it may have felt its hands tied to some extent; the Supreme Court both before and since 1920, has held indefeasible a grant, once made and acted upon. United States v. Central Pac. R. Co. 118 U.S. 235, 238, 6 S. Ct. 1038, 30 L. Ed. 173; United States v. Northern Pac. R. Co., 256 U.S. 51, 63, 64, 41 S. Ct. 439, 65 L.Ed. 825. There are said to have been many valid licenses outstanding in 1920, issued by federal authorities which it was at least doubtful whether Congress could 'affect' at all; § 23(a) excluded these and they adequately account for its enactment. * * *"
>
> See also: *United States v. Big Bend Transit Co.* (D.C. Wash. 1941), 42 F.Supp. 459, 471.)

It is apparent that the Final Power Permit issued on May 27, 1920 and an already constructed project is the kind of a situation intended to be covered by Section 23(a) of the Act. Obviously, there was no other

application before the Commission than that filed by the New Jersey corporation under the provisions of Section 23(a). The Commission decision based on an assumption of termination of the Final Power Permit and granting a license under Section 4(e) of the Act is contrary to the facts before the Commission and contrary to the provisions of Section 23(a) of the Act.

POINT 2

The Commission, in its Order of October 12, 1962, said:

> "*The Montana Power Company, a New Jersey corporation ceased to exist as of November* 30, 1961, *and the Final Power Permit issued to it by the Acting Secretary of Agriculture likewise ceased to be of any legal effect from that day on. Hence, Applicant was not giving up anything of value in applying for a license under the Federal Power Act for the continued lawful operation of its project.* In such circumstances, Applicant has not shown that it is entitled to a license under Section 23(a) of the Act. It appears that the permit would have expired on December 31, 1969, approximately 50 years after its issuance, if the New Jersey corporation had not ceased to exist. In these circumstances, the term of the license issued herein will be for a period effective as of December 1, 1961, and terminating December 31, 1969." (Emphasis ours) (R.1158)

The statement that applicant was not giving up anything of value is contrary to the record. As has been pointed out the hydroelectric development already constructed at Mystic Lake under a Final Power Permit issued on May 27, 1920 by the New Jersey corporation

is clearly one covered by Section 23(a) of the Act.

The New Jersey corporation was the holder of a valid permit which would be effective until December 31, 1969. No application was necessary for a license for that period of time. The New Jersey corporation voluntarily applied for a license under the act. The applicant's request to continue to operate this project until the new license as applied for could be issued was a proper condition of the application. Limiting a new license to the exact period of the old license recognizes that a license is proper, but actually grants nothing not already possessed by the New Jersey Corporation.

The statement that applicant is not giving up anything of value is contrary to the facts. The Final Power Permit of the New Jersey corporation contains a Power Stipulation commencing on page 987 of the record. Article 28 provides that in event of surrender of the project the reasonable value shall be the actual and necessary cost or reproduction cost as of the date of construction less the physical or functional depreciation (Tr. 995). Section 23(a) of the Act provides that for purposes of a license the net investment shall be the fair value of the property at the time of license and that such fair value is to be determined after notice and opportunity for hearing. This fair value is a matter of right under the statute.

The Commission Order denies the application under Section 23(a) and grants a license under Section 4(e) of the Act. Such projects at the termination of the li-

cense period may be taken over by the government under the provisions of Section 14 of the Federal Power Act, 16 U.S.C.A. 807. Article 19 of the Terms and Conditions of License attached to the Commission Order sets forth the net investment as the original cost less accrued depreciation (R.1173). These provisions show that applicant was deprived of a valuable property right when the Commission denied an application for license under Section 23(a) of the Act for a project already constructed and operated under a valid permit. The Order of the Commission violates the contract as set fort hin the Final Power Permit and is contrary to the Congressional intent to protect projects constructed under valid authority granted prior to June 10, 1920. The Commission erroneously deprived applicant of a valid and valuable right.

POINT 3

The application for license under Section 23(a) of the Act requested a license for a term of fifty (50) years. The 50-year term is the maximum specified in Section 6 of the Act, 16 U.S.C. 799. Section 23(a) authorizes the holder of a valid permit to apply for a license for projects already constructed and this clearly contemplated that the license applied for could be for the maximum term specified. The New Jersey corporation already had a Final Power Permit issued and valid which would expire on December 31, 1969. If Congress did not intend that a license to such parties could be issued for the additional term, no purpose would be

served by granting authority to apply for a license. The provision in Section 23 is that the provisions of various sections containing the authority of the Commission do not apply to existing permits. The right to apply for a license clearly implies that something in addition to that already held may be applied for and granted.

In *Pennsylvania Power and Light Co.*, Project No. 2268, issued March 13, 1963, the Commission declined to accept surrender of a license issued under the Act and reissue a new 50-year license on the old portion and the proposed new portion of the project where the total license would exceed the 50-year provision. The license to be surrendered and that applied for were both under Section 6 of the Act. This condition is not existent where the project was under a permit issued before June 10, 1920, and where a holder is granted authority to apply for a license under the provisions of the Federal Power Act, including section 6 of the act.

At the time the Order in the Montana Power case was issued on October 12, 1962, there was 7 years and 2½ months of the permit period remaining. If the license was to be issued only for this period no purpose was served by applying for a license when applicant already had a valid permit for the same period.

The question of the term of licenses was considered in *Duke Power Company*, Project 2232, 20 Fed. Power Comm. 360. in that case applicant, by application filed in 1957, requested 50-year licenses, effective as of the date of its issuance including 10 hydroelectric developments constructed between 1905 and 1928, and one pro-

posed project. The Commission reviewed other cases and for this reason we quote at length from the opinion. The Commission, at page 363, said:

> "We recently had occasion to consider the license term problem in connection with the licensing of constructed project works in formal proceedings on applications for licenses filed by Carolina Aluminum Company in Project No. 2197 and Carolina Power & Light Company in Project No. 2206 on the Yadkin-Peedee River in North and South Carolina. In those proceedings we said in summary (19 FPC 704), that:
>
> *'There is no basis in the act for saying that the operation and maintenance of these existing hydroelectric developments, which were constructed prior to the* 1935 *amendments to the Act, have been operated and maintained unlawfully or in trespass against the United States.* This would be true even if it should be subsequently determined that they are occupying navigable waters of the United States.
>
> 'An examination of the record does not, in our judgment, disclose a rational basis in the evidence which would justify shorter license terms than 50 years or the back dating of licenses, and therefore, *on the basis of the evidence of record and the legal principles set out above, we are without authority to back date the licenses or to issue them for a term of less than* 50 *years.*
>
> "We are not advised of any prior determination that the reaches of the Catawba and Wateree Rivers involved here are navigable waters of the United States making Applicant's prior operation and maintenance of its existing developments on those streams unlawful under Section 23(b) of the Act. Official notice may not be taken of navigability of sections of rivers unless it is a matter of general knowledge that such sections are nav-

igable. That fact must be determined through evidence unless it is a matter of general knowledge. United States v. Utah, 283 U.S. 64, 77. We do not think there is general knowledge that the Wateree and Catawba Rivers are navigable above Camden, at about river mile 67. Furthermore, there has not been a prior Commission determination that these existing developments affect navigable capacity downstream from these developments or that they otherwise affect the interest of interstate or foreign commerce.

"We are unable to distinguish this proceeding from our decision with respect to Project Nos. 2197 and 2206 although some of the project works under the consideration here are located on a stretch of stream which is now found to be a navigable water of the United States. Moreover, if these existing developments were unlawful under the Federal Power Act they would also be unlaful under the River and Harbor Act of 1899 (33 U.S.C. 401, 403) from the date of their construction. Compare, United States v. Appalachian Power Co., 311 U.S. 377, 398. Accordingly, if these existing developments had been operated unlawfully it would appear that any license issued should be made effective as of the time of their construction. The Great Falls development has been in operation in excess of 50 years.

"The situation here is similar to that presented in the proceeding on application by The Montana Power Company for a license for Project No. 2188 involving existing and proposed project works on the navigable Missouri River and existing project works on the Madison River which affect the downstream navigable capacity of the Missouri. There (15 F.P.C. 1330, 1335) we said:

> 'The Applicant seeks a single license for its proposed new Cochrane development and its eight existing hydroelectric developments as a

completely integrated project. We agree with the Applicant that a single license should be issued for these developments. The proposed development and the eight existing developments are integrated and are best adapted to a com prehensive plan for the development of this watershed. There is no constitutional necessity for viewing each propect or development in isolation from a comprehensive plan for the entire basin. This is clearly pointed out by the Supreme Court in the Denison Dam case. Oklahoma v. Atkinson, 313 U.S. 508.

'This concept of considering a particular watershed as a whole, as expressed in Sections 4(e) and 10(a), is the backbone of the licensing provisions of the Federal Power Act. This question was considered at length by the Commission In the Matter of Pacific Gas and Electric Co., 2 F.P.C. 516 (1941). There the Pacific Gas and Electric Company contended that the proposed Pit No. 5 run-of-river hydroelectric development on the Pit River downstream from a licensed development was not subject to the licensing provisions of the Act (p. 521). The Commission found (pp. 525, 529) that the proposed Pit No. 5 development was an essential part of a comprehensive plan of development of the Pit River; that it was subject to the licensing provisions of the Act; and that the license previously issued for the Pit No. 3 and Pit No. 4 developments should be amended to include the proposed Pit No. 5 development.

'The Applicant also asks that the terms of the license be for a period of fifty years from the date of issuance. The application for the eight existing developments was filed pursuant to the Commission's findings and order issued December 7, 1948, wherein it was determined that they are subject to the licensing provisions

> of the Act (7 F.P.C. 163). Upon consideration of all of the circumstances involved, we conclude that the license be issued herein for the eight existing developments and the proposed Cochrane development shall be for a period of fifty years from the first day of December 1948. This action is consistent with our previous orders upon application presenting similar proposals.
>
> "The legislative history of the Act concerning the term of a license demonstrates the desirability of having the license expire at the same time with respect to all of the project works. Moreover, the legislative history shows that this was the principal reason for not making a 50-year term mandatory under the Act. Although a 50-year license period is not mandatory we must have a rational basis for specifying a shorter period. We find no basis in this proceeding for specifying any period less than 50 years." (Emphasis ours)

The above cases did not involve Section 23(a) applications. Where a permittee has a right under Section 23(a) to apply for a license, there is all the more reason to apply the 50-year maximum license period. *Issuance of a less advantageous license for the identical project and to cover the same time as the existing permit obviously was not the purpose of Section 23a of the Act.* The application allowed by that section should be granted pursuant to the provisions of the Act and the license should be for a term of 50 years in the absence of good reason to the contrary. There is no reason for limiting the license to December 31, 1969 except that the existing permit has the same expiration date. Instead of supporting the Commission action, this fact shows that the Commission has failed to exercise the

proper authority and has erred in not granting the application as applied for.

The record shows that since 1916 the New Jersey corporation has been operating under valid permits issued pursuant to the applicable legislative directives. At the time it made its application for license under Section 23(a) the valid Final Power Permit still had better than seven years to run. The application, for approval of the merger in Docket E-7000, fully discloses the status of applicant and the Mystic Lake project. The applicant was never in trespass. The mere fact that the merger was approved and consummated after the application for license was filed but before the application was approved, cannot make applicant a trespasser. As was said in the *Duke* case, supra, there is no basis for saying the project has been operated unlawfully or in trespass against the United States. Applicant is entitled to the treatment provided for and intended when Congress enacted Section 23(a), where the terms of the Act apply to the facts.

We also call attention to the announced policy to issue licenses to applicants who have been in trespass for terms ending in 1993. This is discussed subsequently and referred to in Appendix "A".

POINT 4

The application is filed under Section 23(a) of the Act. The basis of the denial of this application is the Commission's assertion that the New Jersey corporation permit terminated on November 30, 1961, more

than 10½ months before the Order was issued on October 12, 1962. No notice of this contention was ever given to applicant and no hearing was ever held whereby these facts could be developed or defense to the proposed action of the Commission could ever be presented.

The Federal Power Commission proceedings are subject to the Administrative Procedure Act, 5 U.S.C. 1001-1011 inclusive. Portions of 5 U S C 1006, 1007, 1008 and 1009 are set forth in Appendix B. In all cases where an application for license is made, the agency is required to complete any steps required by Sections 1006 and 1007 of the Act (5 U.S.C.A. 1008). Sections 5 U.S.C.A. 1006 and 1007 contemplate that where issues of fact are to be determined there will be hearing or opportunity for hearing. 5 U.S.C.A. 1007 provides that where the agency makes an initial decision without having presided at the reception of evidence, such officers shall first recommend a decision. Prior to each recommended initial or tentative decision, the parties shall be afforded a reasonable opportunity to submit for consideration proposed findings and exception to the decision and supporting reasons for the exceptions. The record shows that no tentative or initial Order or Notice of the intent to deny the application under Section 23(a) and to arbitrarily grant a license for the remaining period of the existing permit under Section 4(e) was ever given. Neither Applicant nor Petitioner was ever given an opportunity to present its view at any hearing or any opportunity to file exceptions to the final issuance of the Order. The basic rights sought to

be protected by the Administrative Procedure Act have not been denied to applicant. The Commission Rules, in compliance with the Administrative Procedure Act, provide for recommended or tentative decisions and for exceptions to such intermediate decisions. See Rule 1.29, 1.30 and 1.31, of the Commission Rules of Practice. This record shows that applicant was never advised of the proposed Order after the filing of the application and before final action on the merger so that it could decide what action should be taken or file exceptions. The applicant was never given opportunity to file exceptions before the final Order of October 12, 1962 was issued. This action is contrary to the spirit of the Federal Power Act and to the Administrative Procedure Act. It fails to provide applicant with that measure of due process protected by the Constitution.

In *Public Utility District No. 1 v. Federal Power Commission*, (C.A. 9, 1957) 242 F.2d 672 this Court was asked to set aside an order issuing a license where no hearing had been held. The Court at Page 678 said:

> "Under § 308 of the Federal Power Act, Title 16 U.S.C.A. § 825g, the order granting the license was a matter 'required by statute to be determined on the record after opportunity for an agency hearing' within the meaning of § 1004 of Title 5 U.S.C.A. This section of the Administrative Procedure Act calls for notice of hearing to persons entitled thereto, *and makes mandatory the granting of opportunity to such persons to submit evidence, present argument and participate in the consideration of facts to be determined by the Commission.* § 1006 of the same Title, provides for the conduct of such hearings, the evidence to be re-

ceived, and that no order may be issued 'except upon consideration of the whole record * * * and as supported by and in accordance with * * * the evidence,' and provides that 'The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title'. § 1007 *provides for opportunities for proposing findings and the taking of exceptions, particularly in cases where initial or tentative decisions have been made by examiners.* § 1008 requires the proceedings specified in § 1006 and § 1007 to be followed in cases involving applications for a license." (Emphasis ours)

The Court then quoted and discussed the provisions in 5 U.S.C.A. 1009. The Court said:

"Although § 313 containing this requirement was enacted long prior to the Administrative Procedure Act of June 11, 1946, the provisions of the later Act did not supersede the quoted requirement of objections in the application for rehearing. Cf. F. P. C. v. Colarado Interstate Gas Co., 348 U.S. 492, 499, 75 S.Ct. 467, 99 L.Ed. 583. Section 10 of the Act (Title 5 U.S.C.A. § 1009), in subdivision (b), expressly incorporates the procedure provisions of the Federal Power Act, reciting that 'The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute.' *However the question remains whether in view of the purposes and provisions of the Administrative Procedure Act a denial of so fundamental a right as the right to a hearing is not reviewable here on the theory that the Commission denying such hearing has acted in excess of its jurisdiction or power.*" (Emphasis ours).

* * *

"The question now presented to us is whether the

complete failure of the Commission here to hold any hearing notwithstanding petitioner's 'Protest' and 'Petition to Intervene', was so serious a departure from the requirements of the applicable statute that it should be deemed 'one which deprives the Commission of power or jurisdcition, so that even in the absence of timely objection its order should be set aside as a nullity.' "

* * *

"In Wong Yang Sung v. McGrath, 399 U.S. 33, 36-41, 70 S.Ct. 445, 94 L.Ed. 616, and Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 478-484, 71 S.Ct. 456, 95 L.Ed. 456, the Supreme Court has outlined the manner in which dissatisfaction with and criticisms of previously existing practices of administrative agencies, and of the lack of adequate review of their decisions led to the enactment of the Administrative Procedurue Act, a really dramatic development in federal administrative law. Among the several major accomplishments of that Act were two which particuarly concern this case. One was the establishment for all agencies of a uniform provision requiring real hearings, and 'decisions upon the whole record',—a record made, in the language of § 7 of the Act, Title 5 U.S.C.A. § 1006, where 'Every party shall have the right to present his case or defense by oral or documentary evidence,' and where 'The transcript of testimony and exhibits, * * * shall constitute the exclusive record for decision.' The other major provision here noted was that for judicial review based upon 'the whole record' so made."

The Court then set aside the order and returned the case to the Commission for further proceedings.

We recognize the rule as to judicial review of administrative action as stated in *United States v. Pierce*

Auto Freight Lines, 327 U.S. 515, 535, 90 L.Ed. 821, 835, where it was said:

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '. . . the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commisison's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commisison's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

This does not mean that the administrative agency is free of all restraint. Its actions must be founded on law, including the Administrative Procedure Act. 5 U.S.C.A. 1009 specifies the scope of review. As is seen the statute and the cases based thereon limit the scope of review. Where the great weight is afforded to the Administrative determination of the Commission there is all the more necessity that the procedures provide for a right of full presentation prior to the final decision of the administrative agency. There was no opportunity for applicant to make any presentation of facts or to be heard as to any objections prior to the issuance of

the Order of October 12, 1962. There was no opportunity for applicant or petitioner prior to completion of the merger in November 1961 to do anything or present any argument concerning this application. This is a denial of due process. It was an arbitrary action taken subsequent to the required consumation of the merger but based on the action taken in consumating the merger

The Commission, in its Order of October 12, 1962 (R.1157), wherein it granted a license for only seven years, acted arbitrarily, capriciously and contrary to the announced policy of the Commission. The Commission, in its Opinion No. 357, *Public Service Commission of New Hampshire, Project No.* 2288, issued April 25, 1962, considered an application under Section 4(e) of the Act on the Androscoggen River in New Hampshire. The original project had been built in 1894 and rebuilt several times up to 1928. The dam was again rebuilt in 195 8and 1959. The Commission considered the proper term for a license under this condition. The Commission said:

> "This application raises again a question which has preplexed the Commission for many years, *i.e.*, the appropriate license term to be accorded a project constructed prior to the 1935 amendments to the Act, and operated thereafter in navigable waters without requisite federal authorization. The resolution of this question calls for the exercise of sound discretion, for while Section 6 of the Act fixes a 50 year ceiling on license terms, it evidently contemplates that the Commission may prescribe a shorter period if circumstances so warrant. After evaluating all relevant factors, we pro-

pose to issue Applicant a license effective as of July 1, 1958, and terminating December 31, 1993. Since the reasons which lead us to prescribe the above license term will also guide the action we shall take upon pending and future applications involving other pre-1935 projects, it is important that those reasons be fully explained."

* * *

"At least as early as the 1943 decisions, the owner of every project located in a stream capable of being used for the transportation of logs was placed on notice of the perils of further unlicensed operation. Such perils must have been particularly apparent to the present applicant, for logging has been a continuing and conspicuous activity on the Androscoggin down to the present day. For the reasons stated, it is in our view appropriate that the license tendered herein be for a term ending December 31, 1993."

* * *

"In deciding not to impose retrospective charges for the period prior to July 1, 1958, we have given some weight to the possibility that imposition of such charges might seriously deter potential applicants from coming forward to comply with the statute. If, however, our experience during the next twelve months indicates that voluntary cooperation will in any event not be forthcoming, we may well wish to reconsider the position we now take on the question of backdating."

On April 25, 1962 Press Release relating to this decision was made in Release No. 11, 961. On May 8, 1962, Release No. 11, 988 was issued wherein the Commission advised that future licenses for unlicensed projects would be issued for fifty (50) years from 1943 with a termination date of December 31, 1993. Copy of this Release is attached as Appendix "A" hereto. This

policy was restated by Chairman Swidler before the sub-committee of the House Interstate and Foreign Commerce Committee on June 14, 1962 in hearings on H.R. 6591. Granting of the license in this case to expire in 1969 is contrary to the announced policy where a party has not held a license and has been in trespass. The applicant here has been in full compliance with the Federal Laws but it is receiving much less consideration than the announced policy toward trespassers. This is arbitary and capricious.

In *Grace Line, Inc. v. Federal Martime Board* (C.A. 2, 1959) 263 F.2d 709, the court said:

> "With respect to the scope of judicial review of administrative decison, the cases are in agreement that there are minimal standards beyond which the courts cannot allow administrative bodies to go. The reviewing court must satisfy itself that the administrative decision has a 'rational' or 'reasonable' foundation in law, (cases cited); and when not so satisfied the court must reverse the administrative action, Social Security Board v. Nierotko, 1946, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed 718."
>
> See also: United States v. Neely (CA 7, 1953) 202 F.2d 221.

In *Hornsby v. Dobard* (C.A. 5, 1961), 291 F.2d 483, 487, the Court said:

> "If in the administrative procedures there has been a denial of due process, there is a right to a judicial review of the administrative decision."

In *Pacific Far East Lines, Inc. v. Federal Maritime Board* (C.A. D.C. 1959), 275 F.2d 184, the Court said:

> "Section 10 of the Administrative Procedure

> Act subjects 'every agency action' to judicial review, except so far as '(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *' 5 U.S.C.A., § 1009. The Merchant Marine Act does not preclude judicial review and does not commit the Board's action to the Board's discretion. Administrative action that requires a hearing and turns on the meaning and application of statutory language is usually subject to judicial review. As in Shields v. Utah Idaho Central R. Co., 305 U.S. 177, 183, 59 S. Ct. 160, 164, 83 L.Ed. 111, 'The nature of the determination points to the propriety of judicial review.' Nothing in the legislative history indicates a contrary intention. Accordingly the District Court had jurisdiction of this suit.
>
> See also: *Shachtman v. Dulles*, CA, D.C. 1955) 225 F.2d 938, 941.

In Securities and Exchange Commission v. Chenery Corp. (1946) 332 U.S. 194, 91 L. Ed. 1995, the Court said:

> "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

There must be substantial basis in the record and adequate statutory authority to support the Commis-

sion Order. As we have previously argued the record does not support the action of the Commission, and the action is contrary to expressed directive of Congress as stated in Section 23(a) of the Act. We also submit that the action is arbitrary and does not meet the standards of the Administrative Procedure Act or the test of due process.

CONCLUSION

The Montana Power Company, a New Jersey corporation, was the holder of a valid Final Power Permit. Pursuant to Section 23(a) of the Act it applied for a 50-year license under the terms of that section. It was entitled to receive such a license and then transfer it to the Montana Corporation. There is no authority in the law or basis in the record for the Commission to grant a license for only the remaining period of an existing valid permit under Section 4(e), which deprives applicant of the "fair value" basis, without giving it anything in return. Such action, unsupported in fact or in law, deprives the applicant of the right insured to it by Section 23(a) of the Federal Power Act, by the Administrative Procedure Act and the Constitution. This Order of the Commission should be vacated and the proceeding remanded to the Commission for further consideration consistent with the provisions of Section 23(a) of the Federal Power Act, 16 U.S.C.A. 816, and the determination of the Court.

Respectfully submitted,

William H. Coldiron
John C. Hauck
40 East Broadway
Butte, Montana

WEIR, GOUGH & BOOTH

By .....

Edwin S. Booth
First National Bank Building
Helena, Montana
ATTORNEYS FOR PETITIONER
The Montana Power Company,
a corporation

CERTIFICATE

I certify that in connection with this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

Edwin S. Booth
Attorney

(APPENDIX "A")

RELEASE 11,988

FPC ADVISES OWNERS OF APPROXIMATELY 500 UNLICENSED HYDROELECTRIC POWER PROJECTS OF NEW POLICIES IN ISSUING LICENSES FOR DEVELOPMENTS BUILT PRIOR TO 1935

Washington, D.C., May 8, 1962—The Federal Power Commission has sent letters to 196 owners or operators of approximately 500 unlicensed hydroelectric power projects in 37 states asking them whether they propose to file applications for licenses.

The Commission on April 25 issued an opinion spelling out the policies it will follow in issuing licenses for non-federal projects built prior to the 1935 amendments to the Federal Power Act which made it unlawful to construct, operate or maintain hydroelectric project works on navigable waters of the United States without an FPC license or other federal permit.

The Commission's letter said "If you are operating and maintaining a water power development without a valid federal permit issued therefor prior to June 10, 1920, and without a license issued under the Federal Power Act, it is requested that you advise the Commission whether you propose to file application for license."

The FPC's April 25 Opinion No. 357 concluded that:

*Projects built prior to 1935 and still operating without license should not be given the benefit of the maximum 50-year licenses allowed under the Federal

Power Act, dating from time of issuance, after nearly three decades of unregulated operations.

*Licenses for these pre-1935 projects should terminate December 31, 1993, or 50 years from the time the FPC's concept of navigability was settled in 1943.

*In future cases not involving a prior finding of navigability, unauthorized construction since 1935, or other unusual circumstances the 50-year license term for these projects will be computed from 1943, with a termination date of December 31, 1993, and an effective date of April 1, 1962, regardless of when filed. The projects thus will not be subject to retroactive annual charges, which the FPC said might "seriously deter" potential applications.

The Commission's opinion called for voluntary cooperation by owners of unlicensed projects in coming forward with applications. The FPC said that if its experience during the next 12 months indicates that voluntary cooperation will not be forthcoming, "we may well wish to reconsider the position we now take on the question of backdating."

APPENDIX B

Section 6 of Federal Power Act, 16 U.S.C. 799:

License; duration, conditions, revocation, alteration, or surrender

Licenses under sections 792, 793, 795-818, and 820-823 of this title shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and

such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions, and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of sections 792, 793, 795-818, and 820-823 of this title and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41. June 10, 1920, c. 285, § 6, 41 Stat. 1067; Aug. 26, 1935, c. 687, Title II, § 204, 49 Stat. 841.

Section 23(a) of Federal Power Act, 16 U.S.C. 816:

Preservation of rights vested prior to June 10, 1920

The provisions of sections 792, 793, 795-818, and 820-823 of this title shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license under this chapter, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of said sections and in such case the provisions of this chapter shall apply to such applicant as a licensee under this chapter: *Provided*, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purpose of

sections 792, 793, 795-818, and 820-823 of this title and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing. June 10, 1920, c. 285, § 23, 41 Stat. 1075; Aug. 26, 1935, c. 687, Title II, § 210, 49 Stat. 846."

Section 7, Administrative Procedure Act, 5 U.S.C. 1006:

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

* * * * *

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8, Administrative Procedure Act, 5 U.S.C. 1007:

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be

conducted in conformity with section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omited in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or

recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 9, Administrative Procedure Act, 5 U.S.C. 1008:

Imposition of sanctions; determination of applications for licenses; suspension, revocation and expiration of licenses

In the exercise of any power or authority—

* * * * *

(b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demon-

strate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

Section 10, Administrative Procedure Act, 5 U.S.C. 1009:

JUDICIAL REVIEW, OF AGENCY ACTION

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

RIGHTS OF REVIEW

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

ACTS REVIEWABLE

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form

of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

SCOPE OF REVIEW

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.